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Should Originalists Enforce

Rights More Strictly Against the States Than Against the Federal Government?

Michael C. Dorf Mar 20, 2019

Lately, Justice Clarence Thomas has been questioning long-settled and largely uncontroversial constitutional doctrines. Concurring last month in the denial of a petition for review by a woman who had sued Bill Cosby for defamation, Justice Thomas called for the re-examination of *New York Times v. Sullivan*—a landmark 1964 ruling that protects good-faith journalism against the fear of crippling liability. A week later, in the course of dissenting from a decision in

favor of a defendant whose lawyer had failed to file a notice of appeal, Justice Thomas took aim at *Gideon v. Wainwright*—the 1963 decision that guarantees free counsel for indigent defendants in serious criminal cases. In each instance, Justice Thomas (joined by Justice Neil Gorsuch in the right-to-counsel case) complained that the Court had failed to ground the current protections in the original meaning of the underlying constitutional provisions.

After setting forth several critiques of Justice Thomas's campaign against modern constitutional doctrine, I will raise a question that he or anyone who wishes to follow sincerely in the path he is charting will eventually need to confront: Is it possible that the rights protected against federal action by the Bill of Rights adopted in 1791 have a different meaning when applied against the states by virtue of the Fourteenth Amendment adopted in 1868?

Problems with Justice Thomas's Originalism

Justice Thomas's critique of *Times v. Sullivan*, *Gideon*, and numerous other decisions rests on the proposition that the Constitution should be construed in accordance with its original meaning. He favors what the late Justice Antonin Scalia used to sometimes call the "dead Constitution." As that term implies, however, originalism has a rival in living Constitutionalism—the idea that an eighteenth-century document adopted entirely by white men, many of whom owned slaves, can only serve as a foundational charter for our multicultural twenty-first century society if we treat its language flexibly. Many judges and scholars (including me) find living Constitutionalism more sensible, all things considered, than rigid originalism.

Moreover, even if one were persuaded that, in principle, the Constitution should invariably be given its original meaning, the Court does not write on a blank slate. Assuming one could reliably determine a definite original meaning that bears on today's controversies (a heroic assumption in many contexts given technological and other changes), adopting an originalist approach would hardly be conservative in any recognizable sense of the word. *Stare decisis*, the Latin term for the principle that courts adhere to precedent absent very good reason to depart, rests on the notion that overruling precedents disrupts settled expectations. As Professor Thomas Merrill wrote in an insightful 1996 article, true conservatives should favor established precedents—what he calls "the consensus view about the meaning in the legal community of today"—over

disruptive changes rooted in ostensible discoveries of original meaning. Yet, as a recent *New York Times* article noted, Justice Thomas gives virtually no weight to precedent in constitutional cases.

Meanwhile, originalism itself is more of a family of views than a single determinate approach. In the 1970s and 1980s, originalists favored unearthing the original *intent* of the framers and ratifiers of the Constitution. Yet the various framers and ratifiers often had multiple, conflicting intentions. And neither the framers nor ratifiers voted to enact their intentions; they enacted words. Accordingly, by the 1990s, most self-styled originalists no longer sought original intentions. Instead, they sought the original public *meaning* of the document.

The shift from intent to meaning placed originalism on a firmer foundation, but it also reopened the door to indeterminacy. The meaning of terms like "freedom of speech" and "unreasonable searches" can be much vaguer than the framers' concrete expectations. Accordingly, scholars like Professor Jack Balkin have argued that this version of originalism does not differ from living Constitutionalism.

If that's true, what's the fuss? The answer may lie in what I have called a "two-step." The shift from original intent to original public meaning places originalism on a firmer theoretical foundation, but then when it comes time to actually decide cases, self-styled originalists like Justice Thomas revert back to seeking evidence of intent. His calls for re-examining *Times v. Sullivan* and *Gideon* are instructive. He claims to be interested in the original meaning of the First and Sixth Amendments, but he cites no evidence about how the words "speech" or "counsel" were originally understood. Instead, he shows that the law at the time of the Founding and for many years thereafter was less expansive than the modern cases. Yet that evidence bears chiefly on what the framers and ratifiers intended and expected; it does not necessarily bear on the original *meaning* of the constitutional text.

Finally, Justice Thomas appears to be a selective originalist. He calls for re-examining relatively recent doctrines that lead to liberal results but not those that lead to conservative ones. Is there good evidence that the original meaning of the First Amendment included a right to donate money to political campaigns? That the original meaning of the Fourteenth Amendment forbade

race-based affirmative action? If Justice Thomas were really driven by jurisprudential rather than ideological concerns, these questions would lead him to question a wider variety of modern case law. Yet Justice Thomas is the most ideologically conservative justice on the Court. Evaluating Justice Thomas based on how he votes rather than what he says to justify those votes, right-wing ideology, not original meaning, appears to be his chief concern.

1791 or 1868?

Some of the foregoing objections aim at Justice Thomas's actual practice rather than his stated principles. Suppose a judge were persuaded by the principles and wanted to implement them fairly, without any ideological agenda. Such a judge would face a difficulty that neither Justice Thomas nor most other originalists seem to give adequate attention: changes in meaning between 1791 and 1868.

The Bill of Rights was ratified in 1791. Thus, its original public meaning is its public meaning in 1791. But the Bill of Rights places limits only on the federal government. The Fourteenth Amendment—which was ratified in 1868—makes (nearly all of) the provisions of the Bill of Rights applicable to the states. If, as originalists argue, contemporary meaning is not necessarily original meaning, then 1868 meaning is not necessarily 1791 meaning.

Consider an important example. Justice Thomas and other conservatives frequently object to the doctrine of so-called substantive due process, under which the Due Process Clauses of the Fifth and Fourteenth Amendments constrain not just the procedures the government may use to deprive people of liberty or property but also the substance of legislation. From the 1890s through the 1930s, the Supreme Court protected economic rights via substantive due process, and since the 1960s it has used the doctrine to protect so-called privacy rights like contraception, abortion, and marriage (including same-sex marriage). Standard critiques of substantive due process attack its use under both the Fifth and Fourteenth Amendments. Yet, as Ryan Williams (now a law professor at Boston College) argued in a 2010 *Yale Law Journal* article, there is good historical evidence that while the notion of substantive due process was largely unknown in 1791, by 1868 it had wide currency. Thus, we have reason to conclude that the original public meaning of the Fifth Amendment does not include substantive due process, but the original public

meaning of the Fourteenth Amendment does.

A similar evolution arguably occurred with respect to the right to keep and bear arms. As used in the Second Amendment, the phrase might be confined to military service rather than individual self-defense. Yet, Professor Akhil Amar has observed that by the time of Reconstruction, the term had come to encompass an individual right. Although Amar himself believes that the combination of the Second and Ninth Amendments properly gives rise to an individual right to firearms possession that limits federal as well as state action, the overall evidence could support a different conclusion—namely that the original meaning of the Second Amendment does not include an individual right to armed self-defense enforceable against the federal government but the original meaning of the Fourteenth Amendment does include such a right enforceable against state and local governments.

Justice Thomas glosses over that kind of temporal distinction by citing a supposedly continuous pattern encompassing both key dates. Calling for the re-examination of *Times v. Sullivan*, he says: "From the founding of the Nation until 1964, the law of defamation was almost exclusively the business of state courts and legislatures." Likewise, in criticizing *Gideon*, he says: "This understanding—that the Sixth Amendment did not require appointed counsel for defendants—persisted in the Court's jurisprudence for nearly 150 years."

Yet, as I noted above, this sort of evidence bears more on the original intentions and expectations of the relevant framers and ratifiers than it bears on the original meaning of the relevant words. And even if the best evidence suggests that there was no salient drift in the meaning of "speech," "press," or "counsel" between 1791 and 1868, a committed public-meaning originalist cannot know that in advance.

The End of Jot for Jot Incorporation?

In various cases—including as recently as last month in a case from Indiana involving the Eighth Amendment's Excessive Fines Clause—Justice Thomas has argued that the Fourteenth Amendment's Privileges or Immunities Clause rather than its Due Process Clause should be the basis for incorporating the Bill of Rights. While such a shift would be interesting in various ways, it does not bear on the temporal question. Whatever clause of the Fourteenth Amendment

incorporates a rights provision, for an originalist the key date should be 1868, not 1791.

And yet, as the Excessive Fines Clause case underscores in a footnote, "incorporated Bill of Rights protections apply identically to the States and the Federal Government." That footnote was quoting language first authored by Justice Samuel Alito, in a footnote in the 2010 case that held the Second Amendment applicable to the states. Although Justice Thomas did not join all of Justice Alito's opinion, he did join the portion that contained the language endorsing what is sometimes called jot for jot incorporation.

Before the Supreme Court endorsed jot for jot incorporation, states had greater latitude to undertake activities that the federal government was forbidden from undertaking. For example, prior to 1961, in criminal trials in state courts the Fourteenth Amendment was not understood to bar admission of evidence obtained via a search or seizure that, if conducted by federal agents, would violate the Fourth Amendment. That difference could be justified, if at all, in virtue of principles of federalism.

Notably, consistent attention to the relevant date for considering original meaning could reverse the valence of state/federal differences. Where meaning evolved towards broader rights between 1791 and 1868—as with substantive due process and the right to keep and bear arms—the Constitution could place *stricter* limits on states than on the federal government.

Does that make any sense? Maybe not, but it does appear to be a logical implication of the philosophy that Justices Thomas and (to some extent) Gorsuch seem committed. Time will tell whether any justice follows where the logic leads.

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